

## Political Dilemmas

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- I. Introductory Comments

Fundamental principles, such as those of democracy and human rights, are sometimes dramatically at odds with each other. It is a mistake to regard these cases as involving only apparent conflicts, which vanish upon closer inspection. One must instead acknowledge that the two norms at issue clash in the specific context and that opting for one over another will produce a real sense of loss, even if the choice is correct. The community will come to regret not its endorsement of the prevailing principle, but rather

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its neglect of the alternative. It will have to make amends vis-à-vis the individuals or groups it has let down in the process. Thus, the notion of an irreducible dilemma, which Bernard Williams invokes in his discussions on morality,<sup>1</sup> applies with equal force in the realm of political philosophy.

This kind of predicament brings about extensive collective pain, and at times even tragedy. A polity mired by these impasses would be completely dysfunctional. It would be in constant turmoil and inevitably disintegrate. Fortunately, these intense conflicts occur rather rarely. Political theory should not overstate the frequency of political dilemmas. Actually, to treat them as a recurrent theme is to trivialize them and to underestimate the extent to which they put the community to the test.

How would I define the kind of conflict at stake in this paper? Of course, a dilemma of sorts already crops up when a gun-pointing mugger bids “Your money or your life,” especially if your life isn’t worth much without your money. Yet, the collisions at issue in this piece are of an altogether different nature, if only because they involve principles instead of interests. Moreover, they affect political communities rather than individuals.

For the moment, I shall simply state that a political dilemma emerges when two valid norms point a polity in opposite directions.<sup>2</sup> For example, the democratic principle may require respecting a majority decision that burdens a minority, while equality demands disregarding such a determination. The normative clash does not necessarily imply a deadlock. In fact, I focus on cases in which the political community is able to

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<sup>1</sup> Bernard Williams, *Ethical Consistency*, PROBLEMS OF THE SELF: PHILOSOPHICAL PAPERS 1956-1972 (1973), at 186.

make a reasonable choice between the two competing commandments. My discussion aims to clarify further what these normative collisions are all about.

I first examine Jürgen Habermas's position in order to show the appeal of categorically denying political dilemmas. Such a stance seems to enable communities to hold on to and to live by all of their convictions. It thus appears to deliver them from having to act arbitrarily or against their conscience. Moreover, it points to an internal connection between the various collective norms and therefore to a coherent communal existence.

I then make the case for opening up to the possibility of these kinds of conflicts. Indeed, situations may arise in which the demands of one principle run counter to those of another. Even if the community knows which of the two principles it should follow and proceeds accordingly, it does not extinguish the claims of the overridden norm. A residue remains. Despite acting as it should, the community experiences a bitter aftertaste. In addition, it normally has a duty to give satisfaction to those it has failed.

I maintain that this position does not impinge upon basic deontic logic. Even if carrying out "A" is incompatible with "B", having separate obligations with respect to A and B does not entail a duty both to do and not to do A. An obligation to perform B carries with it a general commitment to create conditions for B's fulfillment, but not a specific duty to avoid any incongruous act, such as A. By the same token, holding obligations to achieve A and B under these circumstances does not violate the practical requirement that 'ought' imply 'can.' The two independent duties do not aggregate to an obligation to accomplish both A and B simultaneously.

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<sup>2</sup> Nagel regards these dilemmas as most extreme kind of practical conflict. "The strongest cases of conflict are genuine dilemmas," he writes, "where there is decisive support for two or more incompatible courses of

Moving to a more concrete plane, I discuss three instances in which fundamental norms clash. They involve the British authorities' 1998 decision to ban the Orange Order's parade through a Catholic neighborhood, the defense of French Canadian culture in Quebec, the ban of commercial surrogate motherhood agreements. I contend that in all three contexts, one best understands the stakes by acknowledging a normative conflict. The collisions are, respectively, between free speech for extremists and minority rights, between the democratic will to promote the national culture and the right of linguistic subgroups, and between the notion of fairness to childless parents and that of preventing exploitation of surrogate mothers.

The final section presents counter arguments. In response, I make some concessions, modifications, and clarifications. I distinguish between tensions and dilemmas. Furthermore, I recognize that the latter do not present an inherent contradiction between the principles themselves, but rather between their applications. Nonetheless, I hold on to my assertion that a polity can best account for the risks, obligations, and emotions involved in these trying moments by acknowledging that it is confronting a political dilemma.

## II. The Appeal of a Perfectly Coherent System of Political Principles

I begin by considering the views of Jürgen Habermas on the relationship between democracy and human rights. Habermas goes out of his way to dispel the idea that these two concepts may clash. He makes a powerful attempt to show that they actually

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action or inaction.” THOMAS NAGEL, MORTAL QUESTIONS 179 (1989).

presuppose and support each other. He believes, more generally, that all political principles must be similarly coherent. Focusing on his position will enable me not only to examine a most sophisticated effort to exclude the possibility of a political dilemma, but also to show why this kind of project is so appealing in the first place. I thus set the stage to bring in my argument that any such an undertaking is ultimately wrongheaded.

Habermas endeavors to show that democracy, or “popular sovereignty,” and human rights, though occasionally seeming to clash, in fact always reinforce each other. Human rights never check or restrict popular sovereignty, but actually make possible its genuine exercise. Accordingly, requiring the majority to respect human rights is not a constraint on, but rather the principal foundation of, true democracy.

Habermas’s political philosophy identifies human rights precisely with the premises underlying the democratic process. “The substance of human rights thus lies in the formal conditions for the legal institutionalization of the discursive formation of opinion and will within which popular sovereignty takes a legal form.”<sup>3</sup> The democratic process, which discursively shapes the citizenry’s opinion and will, requires recognizing individuals certain participation rights, such as freedom of expression and assembly, the free vote, and equality. “The principle that all state violence stems from the people,” Habermas declares, “must be *specified* contextually in the form of freedom of opinion, information, assembly, association, belief, conscience, and confession, as well as rights to participate in political elections and other votes and to join political parties and civic movements, etc.”<sup>4</sup> Habermas would undoubtedly agree with Joshua Cohen that “the

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<sup>3</sup> JÜRGEN HABERMAS, *FAKIZITÄT UND GELTUNG: BEITRÄGE ZUR DISKURSTHEORIE DES RECHTS UND DES DEMOKRATISCHEN RECHTSSTAATS* 135 (1992).

<sup>4</sup> *Id.* at 162.

[basic individual] freedoms are not simply one of the themes of deliberation, but rather help to form the structure that makes deliberation possible.”<sup>5</sup>

Habermas strives to find a middle point between two extremes: the liberal tradition inspired by Immanuel Kant and its republican counterpart based on Jean-Jacques Rousseau. Both Kant and Rousseau seek to make room in their schemes for democracy as well as for human rights. In the words of Habermas: “Rousseau and Kant attempt, through the concept of autonomy, to conceive the union of practical reason and sovereign will in such a way that the idea of human rights and the principle of popular sovereignty are interpreted *reciprocally*.”<sup>6</sup> Habermas believes that these two philosophers, each in their own way, ultimately fail in this endeavor, while he can succeed with a completely different approach.

Habermas maintains that Kant ends up superimposing a categorical moral system, which includes a set of preeminent human rights, on the practice of democracy. “In this regard, human rights, which are grounded morally, limit the sovereignty of the citizens’ ‘concurring and unified will’.”<sup>7</sup> Rousseau, by contrast, subordinates human rights to the general will. Consequently, he embraces the “republican tradition,”<sup>8</sup> according to which “human rights acquire their binding character *vis-à-vis* an essentially political community only as elements of a tradition peculiar to and consciously appropriated by such a community.”<sup>9</sup> “In both Kant and Rousseau,” Habermas insists, “there exists implicitly a

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<sup>5</sup> Joshua Cohen, *Deliberation and Democratic Legitimacy*, THE GOOD POLITY: NORMATIVE ANALYSIS OF THE STATE 30 (Alan Hamlin & Phillip Pettit, eds., 1989).

<sup>6</sup> HABERMAS, *supra* note 3, at 130. *See also* JÜRGEN HABERMAS, DIE EINBEZIEHUNG DES ANDEREN: STUDIEN ZUR POLITISCHEN THEORIE 89, 293, 299 (1996).

<sup>7</sup> HABERMAS, *supra* note 3, at 131.

<sup>8</sup> *Id.* at 132.

<sup>9</sup> *Id.* at 130.

*relationship of competition between human rights, which are grounded morally, and the principle of popular sovereignty.”*<sup>10</sup>

Habermas, in contrast, takes the position that democracy and human rights are coequal and co-originating.<sup>11</sup> He therefore looks to establish the “internal connection between popular sovereignty and human rights”, which escapes Kant and Rousseau.<sup>12</sup> Habermas contends that this connection “lies in the normative content of a *way of exercising political autonomy*, which... is determined by the communicative form of discursive opinion and will formation.”<sup>13</sup> He concludes that “in this way, private and public autonomy are mutually implied, so that neither human rights can claim primacy over popular sovereignty nor vice versa.”<sup>14</sup>

Habermas takes democracy and human rights to be expressions, respectively, of the public and private dimensions of the very same autonomy principle. He thus accounts for the intimate interrelationship between these two notions. Consequently, he excludes the possibility of real competition, let alone incommensurability, between them.

In the Habermasian rendering of the concept of autonomy, no hierarchy exists between public and private autonomy, as occurs in Kant’s or Rousseau’s theory. Habermas does not attribute autonomy exclusively to the “individual subject” or to the “macro-subject of a people or a nation.”<sup>15</sup> The exercise of autonomy takes place instead

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<sup>10</sup> *Id.* at 123. See also *id.* at 129; HABERMAS, *supra* note 6, at 288.

<sup>11</sup> See Charles Larmore, *The Foundations of Modern Democracy: Reflections on Jürgen Habermas*, 3 EUR. J. PHIL. 55, 64-66 (1995).

<sup>12</sup> HABERMAS, *supra* note 3, at 133. See also *id.* at 129; HABERMAS, *supra* note 6, at 242, 300.

<sup>13</sup> HABERMAS, *supra* note 3, at 133.

<sup>14</sup> HABERMAS, *supra* note 6, at 301. See also HABERMAS, *supra* note 3, at 479.

<sup>15</sup> HABERMAS, *supra* note 3, at 134. See also HABERMAS, *supra* note 6, at 288.

within “discourses... and negotiations whose procedures are discursively grounded.”<sup>16</sup>

Habermas explains:

As participants in rational discourses, legal consociates must be able to test whether a contested norm can or could obtain the acquiescence of all those who might be affected. Thus, the desired internal connection between popular sovereignty and human rights consists in the fact that the system of rights represents precisely those conditions under which communication forms that are necessary for a politically autonomous legislation can, in turn, be institutionalized.”<sup>17</sup>

For Habermas, public autonomy is exercised as political autonomy. In other words, it unfolds in the context of a discursive democratic process, which requires respecting private autonomy as expressed in a set of human rights.

To this point, Habermas’ account sounds terribly abstract. It is difficult to see what practical consequences this conceptual elucidation might have. It is therefore helpful to move to a more concrete plane. To this end, I shall apply the argument to some specific problems.

In developing his argument, Habermas primarily contemplates cases in which human rights appear to contradict and displace democracy. One example would be the legal protection of Muslims against the repressive efforts of a predominantly Christian community. Habermas would claim that in such a scenario, the principles of private and public autonomy do not really clash. The hegemonic ambitions of the Christians do not have a foundation in, but rather infringe upon public autonomy, which demands the respect of individual liberties. Popular sovereignty, in other words, is legitimate only if it honors fundamental human rights.

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<sup>16</sup> HABERMAS, *supra* note 3, at 134.

<sup>17</sup> *Id.* at 134.



The underlying idea is that genuine democracy requires that all members of the polity be a part of the collective self-determination effort. Everyone must have not only a right to vote, but also to organize politically and to participate in all relevant debates. More significantly, the political community has to treat all of its members with respect, if they are to be effective political actors.<sup>18</sup> When it violates any of their civil or social rights, it undermines their political rights, thwarts democracy, and violates public autonomy.<sup>19</sup>

The majority's will carries normative weight, within the Habermasian perspective, only insofar as it complies with certain requirements, such as the assurance of basic personal rights. If it failed to meet these conditions, individual dissidents would be morally indifferent to its preferences, just as they would be to the predilections of a group of complete strangers they happened to encounter.<sup>20</sup> The democratic process commands the allegiance of even those that do not agree with its results, precisely by virtue of the consideration it shows to all. The citizens participating, face to face and as equals, understand that in the end there must be a vote, that it is possible that their point of view may not prevail, and that the majority should carry the day.

Habermas deploys the same reasoning in situations in which it is democracy that seems to prevail over human rights. He denies the existence of a genuine conflict when

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<sup>18</sup> It would seem that this notion of democracy would require respect for the rights of citizens, but not of foreigners. Habermas might retort that popular sovereignty must protect the prerogatives of aliens qua potential citizens. In other words, inasmuch as someone may obtain citizenship, an authentically democratic majority must treat him or her with respect.

<sup>19</sup> See HABERMAS, *supra* note 3, at 105 ("Certainly, personal liberties as well as social security can be regarded as the legal basis for that social autonomy that makes possible an effective exercise of political rights. Yet, what is at stake here is an empirical and not a conceptually necessary relationship.").

<sup>20</sup> Habermas quotes John Dewey: "Majority rule, just as majority rule, is as foolish as its critics charge it with being. But it never is *merely* majority rule... The means by which a majority comes to be a majority is the more important thing: antecedent debates, modification of views to meet the opinions of minorities... The essential need, in other words, is the improvement of the method and conditions of

twentieth century public law demands displace nineteenth century private law prerogatives. To be sure, public law ultimately reins in the individual freedoms enshrined in the civil codes in the aftermath of the French Revolution. In other words, property or contract rights yield to collective values such as social justice. Habermas obviously recognizes this phenomenon, but insists that there is no collision of principles. “Above all, the restriction of classical fundamental liberties,” Habermas writes, “can in no way be traced back to the interference of *other* legal principles (such as justice or social responsibility).”<sup>21</sup> Similarly, Habermas declares false the assumption that in these cases “the validity range of the classical notion of private autonomy has been truncated by the politically implemented validity claim of a competing notion,”<sup>22</sup> that is, public autonomy.

Habermas’s theory purports to escape the dilemma through two related but distinguishable routes. First, Habermas clarifies that the principle of private autonomy expressed in civil codification already incorporates the notion of equality. This principle, consequently, “coincides with the general Kantian human right, i.e., the right to the greatest possible amount of equal individual freedom of action.”<sup>23</sup> Habermas insists that “private autonomy in the sense of this general right to liberty implies a general right to equality, precisely the right to equal treatment in accordance with norms that guarantee substantive legal equality.”<sup>24</sup> From this point of view, the restrictions on the enjoyment of private property or to freedom of contract are based on equality and therefore do not

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debate, discussion and persuasion.” *Id.* at 369 (citing John Dewey, *THE PUBLIC AND ITS PROBLEMS* 207f. (1954)).

<sup>21</sup> *Id.* at 483.

<sup>22</sup> *Id.* at 482.

<sup>23</sup> *Id.* at 481. *See also id.* at 153 (“The [Kantian] legal principle certainly demands not only the right to individual liberties generally, but also to *equal* individual liberties.”) & 157 (“Kant’s legal principle takes the form of a general right to equal freedoms.”).

violate, but rather reinforce private autonomy. For instance, in invalidating certain types of agreements between management and workers, labor law furthers rather than hinders the achievement of a maximum of equal individual freedoms.

Second, Habermas maintains that modifying private law from the perspective of public law ultimately affords individuals the means to exercise fully their private autonomy. Typically, this kind of amendment not only has a re-distributive effect, but also tends to provide persons with a minimal prosperity level, which permits them to act autonomously in practice as well as in theory. What is the point of having a right to property, for instance, if one does not possess any? Habermas notes that

the expectation of achieving social justice through private law's elaboration of the principle of legal freedom indeed depended implicitly on the establishment of non-discriminatory *conditions for the factual assertion of the freedoms* recognized by the norms of contract, property, inheritance, and association law. These freedoms rest implicitly on certain social theoretic assumptions or factual presuppositions: first and foremost on assumptions about economic balance in production processes organized as markets (with entrepreneurial freedom and consumer sovereignty), as well as on related sociological assumptions about a broad distribution of property and an approximately equal distribution of social power. These assumptions are supposed to assure equal opportunity in the exercise of private law prerogatives.<sup>25</sup>

Habermas resolves that factual equality, which seems to bear only on public autonomy, is also an integral part of private autonomy and instrumentally advances it.

Habermas describes the internal connection between democracy and human rights persuasively. However, his categorical denial of the possibility of conflict is counterintuitive. Although it would be strange for society's aims to be constantly at odds with each other, is it not quite natural that ideals, such as democracy and human rights, clash every now and then?

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<sup>24</sup> *Id.* at 483-84.

<sup>25</sup> *Id.* at 484-85. *See also id.* at 483-84.

A wild man at heart, Habermas would not retreat at this point, but would rather radicalize his position. He would reject conflicts between democracy and human rights, as well as between any two valid political principles. He would maintain that admitting the possibility of a collision between such norms would amount to assimilating them to values and, consequently, misunderstanding what they are all about.

Habermas readily concedes that values may clash. “Different values compete for priority; as they attain inter-subjective recognition within a culture or life form,” he maintains, “they constitute a configuration that is flexible and prone to tension.”<sup>26</sup> Yet, he fundamentally distinguishes norms in this regard. “If they are to claim validity for the same circle of addressees,” he affirms, “different norms may not contradict each other; they must hang together coherently, i.e., they must constitute a system.”<sup>27</sup>

Hence, when Habermas states that democracy and human rights may not come into collision, he must be regarding them as norms, not as values. However, this classification seems odd, if not in relation to human rights, at least with respect to democracy. When one speaks of the latter, one is usually thinking of a value, in the sense of a broad aspiration. Rarely does a norm or a concrete principle of action come to mind.

In classifying democracy and human rights as norms, Habermas is not simply making a semantic point against common linguistic usage. He is implicitly asserting that these notions differ in kind from values. In other words, he is assuming that they have a distinct set of characteristics. By the same token, he would insist on distinguishing all political principles from values.

“Norms and values,” Habermas postulates,

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<sup>26</sup> *Id.* at 311.

<sup>27</sup> *Id.*

differ, first, in that the former refer to obligatory action, while the latter refer to teleological action; second, in that the validity claim of the former has a binary coding, whereas that of the latter has a gradual coding; third, in that the former bind absolutely and the latter relatively; and, fourth, in that the interrelation of a system of norms and that of a system of values must satisfy different criteria.<sup>28</sup>

Insofar as he regards democracy and human rights as norms, Habermas must be attributing to them the four corresponding properties.

First, these concepts are deontological, i.e., they set forth duties without any reference to particular ends. For instance, democracy calls for regular elections not because happiness or utility will thereby increase, but rather because citizens have a right to vote. Even if it thus impaired any or many of the citizenry's ends, the principle would continue to require universal suffrage.

Secondly, the Habermasian notions of democracy and human rights single out specific actions as right or wrong, not as more or less desirable. For example, if telephone tapping runs counter to human rights, it is unacceptable. Its acceptability, under this viewpoint, is by no means a function of whether and to what extent the polity endorses human rights, as if they were values.

Thirdly, Habermas presumes that the mandate of public and private autonomy "has the absolute sense of an unconditional and universal obligation: the imperative claims to be equally valid for all."<sup>29</sup> "The attractiveness of values," in contrast, "has the relative sense of a valuation of goods embedded or adopted within a culture or life form."<sup>30</sup> The claims of democracy and human rights, consequently, apply in all societies at all times. Of course, this absoluteness does not preclude the possibility of deploying

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<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

these concepts contextually, so that the specific policies required may vary from one community to the next.

The fourth attribute is, of course, the one on which this paper focuses. Accordingly, democracy and human rights may not collide. If these notions were values, they might at times clash with each other and call for a relative ranking. As valid norms, however, they must be in harmony. When one of them calls for a certain course of political action, the other one may not point in the opposite direction. Their imperatives must be categorical and consistent. Therefore, democracy and human rights must be part of a coherent system of principles, not of a random assortment of aspirations.

Habermas believes that all political principles, as norms, must have all of these characteristics. They may not have some and not others. To admit the possibility of collisions is not simply a misunderstanding, but rather category mistake. It implies treating these notions as values and thus fundamentally misconceiving them.

The claim that there can be no collisions between political principles is appealing because it appears to guarantee that societies will always be able to satisfy all such norms simultaneously. It excludes absolutely the possibility of having to choose between or disregard important principles. It also renders unnecessary balancing and prioritizing seemingly competing norms.

Habermas' account is particularly attractive because, as I have already noted, it points to an internal relationship between democracy and human rights. It traces the two notions back to the principle of autonomy. This interconnection not only provides an additional guarantee that there will be no collisions. It also underscores a fundamental unity in society's main political commitments.

The concept of autonomy does not, however, operate as the ultimate end that resolves conflicts between lower rules. It is not, in other words, the functional equivalent of the principle of utility. Habermas does not subordinate democracy and human rights to the notion of autonomy. He does not maintain that in case of tension, whichever of these two norms maximizes autonomy should prevail. Such an assertion would fly in the face of his conception of a norm.

Habermas believes instead that democracy and human rights are different expressions of the same principle of autonomy, somewhat like Kant takes his three formulations of the categorical imperative to emanate from the same moral law. It might be tempting to regard the coexistence of three persons—Father, Son, and Holy Spirit—within a single God as another illustration of this general idea. Yet, we should resist this temptation.<sup>31</sup> As catechism solemnly teaches us, the Holy Trinity is a mystery, which we simply cannot explain and must accept on faith. Habermas would most certainly maintain that the relationship between political norms—such as democracy or human rights—and autonomy is in no way enigmatic, but rather entirely discernible with the right amount of philosophical insight and patience.

Habermas would hold that all alleged conflicts between democracy and human rights result from a misinterpretation of one or both of these notions. In these cases, he would propose a more careful reading of these two norms in order to realize that they ultimately call for the same result.<sup>32</sup> From his perspective, the concept of autonomy provides the guiding light in this process of re-examination and reconciliation.

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<sup>31</sup> “I can resist anything, but temptation.” OSCAR WILDE, *LADY WINDERMERE’S FAN* 90 (Vincent F. Hopper & Gerald B. Lahey, eds., 1960).

<sup>32</sup> Habermas approach would thus resemble that of Kant on cases of apparent moral conflict. “The Kantian answer... is easy to summarize: Review the facts of the case, explore your options, and be guided by the

Habermas would similarly vouch for the ultimate convergence of all political principles. He would probably trace all such norms back to the notion of autonomy. He would thus guarantee the coherence of the entire political culture. In the face of apparent conflicts, he would recommend reconnecting the principles at stake back to the idea of autonomy in order to understand that they actually do not clash, but rather complement each other.

### III. Biting the Bullet: Confronting Political Dilemmas

Habermas' contention that there can be no conflict between democracy and human rights finds support in the writings of his compatriot Robert Alexy,<sup>33</sup> as well as in those of his fellow deliberative democrat Carlos Nino.<sup>34</sup> Analytic political philosophers, such as John Rawls and Charles Larmore, also back Habermas on this point.<sup>35</sup> Even

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ideas expressed in the various versions of the Categorical Imperative.” Thomas E. Hill, Jr., *Moral Dilemmas, Gaps, and Residues: A Kantian Perspective*, MORAL DILEMMAS AND MORAL THEORY 167, 173 (H.E. Mason, ed., 1996). See also *id.* at 175.

<sup>33</sup> ROBERT ALEXY, RECHT, VERNUNFT, DISKURS: STUDIEN ZUR RECHTSPHILOSOPHIE 163-64 (1995).

<sup>34</sup> To be sure, Nino speaks of human rights in general as a “counterweight” to democracy. CARLOS NINO, THE CONSTITUTION OF DELIBERATIVE DEMOCRACY 43, 44, 69, 75, 79, 90, 92, 105, 106, 134 (1996). Yet, he specifically interprets them as one of the premises of democracy. Nino explains that “fundamental rights... are prerequisites for the proper operation of the democratic process.” *Id.* at 39. Similarly, he declares the following. “There can be no tension between the recognition of rights and the operation of the democratic process, since the value of the democratic process arises from its capacity to determine moral issues such as the content, scope and hierarchy of rights.” *Id.* at 137. Nino thinks, that the democratic process has value only to the extent that it recognizes and precisely defines human rights. If the process refuses to respect those rights, it cannot function properly and is worthless. See Ángel R. Oquendo, *Deliberative Democracy in Habermas and Nino*, 22 OXFORD J. LEGAL STUD. 189, 197-98 (2002). See also Ángel R. Oquendo, *Reflexiones sobre las premisas, el contenido y la variabilidad del concepto de la democracia*, REVISTA JURÍDICA DE LA UNIVERSIDAD DE PALERMO (2000).

<sup>35</sup> See John Rawls, *Reply to Habermas*, 92 J. PHIL. 132, 162 (1995); Charles Larmore, *The Foundations of Modern Democracy: Reflections on Jürgen Habermas*, 3 EUR. J. PHIL. 55, 66-67 (1995). Though he recognizes that “Habermas is probably right in that typical individual rights work to make democratic self-government possible,” Larmore points out that “this cannot be its only rational support. They also concretely express the most profound human right which is equal respect and that establishes the ideal of



Ronald Dworkin, who originally interpreted individual rights as “trumps” against the majority will,<sup>36</sup> now agrees with Habermas that the relation between democracy and human rights involves complementation rather than competition.<sup>37</sup>

Immanuel Kant takes an interesting position on this matter. As already pointed out, he makes less of an effort than Habermas to find a balance between democracy and human rights. Ultimately, Kant subordinates the former to the latter. All the same, he would reject the existence of a conflict between the two notions inasmuch as the moral prerogatives of individuals simply extinguish the claims of popular sovereignty. Consequently, he would also concur with Habermas in denying the reality of dilemmas in this or in any other ethical domain.<sup>38</sup>

This wide consensus is not surprising. Philosophers have traditionally sought to explain away principled conflict in the realm of moral and political philosophy.<sup>39</sup> The prevailing view has indeed been that principles may not clash. Philosophers have thus implicitly assimilated judgments about morality and politics to those about the physical

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democratic self-government by itself.” *Id.* at 67. All the same, Larmore agrees with Habermas that there is no tension between human rights and democracy.

<sup>36</sup> Ronald Dworkin, *Rights as Trumps*, THEORIES OF RIGHTS 153-67 (Jeremy Waldron, ed., 1984). *See also* RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 194 (1977) (“A right against the government must be a right to do something even when the majority thinks that it would be bad to do it and even when to do it would harm the majority.”); *Id.* at 269 (“If a person has a right to something, it is bad for the government to deny it even when it is in the general interest.”).

<sup>37</sup> Ronald Dworkin, *Constitutionalism and Democracy*, 3 EUR. J. PHIL. 2 (1995).

<sup>38</sup> *See* Ruth Barcan Marcus, *More about Moral Dilemmas*, MORAL DILEMMAS AND MORAL THEORY 23, 24 (H.E. Mason, ed., 1996) (“Kant denied the reality of moral dilemmas.”); Thomas E. Hill, Jr., *Moral Dilemmas, Gaps, and Residues: A Kantian Perspective*, MORAL DILEMMAS AND MORAL THEORY 167, 173 (H.E. Mason, ed., 1996) (“Kant held that ethics is based on reason and that a rational moral system cannot admit genuine conflicts of duty.”).

<sup>39</sup> Marcus describes this philosophical tradition as it pertains to morality in the following terms. “We will say that the denial of the reality of moral dilemmas consists in claiming that in every situation where the moral code applies, there is one right choice in accordance with the code, and on making that choice there is no residue. Doing the right thing cancels other apparent conflicting obligations.” Ruth Barcan Marcus, *More about Moral Dilemmas*, MORAL DILEMMAS AND MORAL THEORY 23, 24 (H.E. Mason, ed., 1996). *See also* Alan Donagan, *Moral Dilemmas, Genuine and Spurious: A Comparative Anatomy*, MORAL DILEMMAS AND MORAL THEORY 11, 15 (H.E. Mason, ed., 1996) (“Rationalist theories cannot allow moral

world. The premise is that just as one may not assert that the earth is both round and flat, one may not contend that I have a duty to return the weapons of a murderer on the prowl and an obligation to protect potential victims.<sup>40</sup> Similarly, one may not declare that a polity should both honor the majority's will to discriminate and prevent discrimination against minorities.

A related argument stems from the deployment of the Kantian maxim that 'ought' implies 'can' in both moral and political philosophy.<sup>41</sup> More specifically, if individuals ought to execute two actions, they must be able to do both. If they cannot do both, they cannot have a duty to both. Under these circumstances, they can at most have an obligation to do one of the two. The same reasoning would appear to hold in the case of political communities.

From this perspective, there may be no real collisions between moral or political principles. If there seems to be a clash, philosophers must dispel this appearance. They must show that at least one of the norms is not operative. The explanation might be, for instance, that an overlooked exception is at play.

Bernard Williams challenges this approach to individual morality.<sup>42</sup> He contends that people sometimes cannot completely bypass true moral dilemmas through deliberation. In these cases, obligations are irremediably at odds with each other. Moral

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dilemmas because of what they assert about the moral codes they endorse."). This account also captures the traditional repudiation of political dilemmas.

<sup>40</sup> "Plato's example is often cited: a person leaves a weapon with you for safekeeping but when he returns to claim it. You observe that he has become demented and has murderous intentions." Mary Mothersill, *The Moral Dilemmas Debate*, MORAL DILEMMAS AND MORAL THEORY 66, 66 (H.E. Mason, ed., 1996).

<sup>41</sup> See Immanuel Kant, KRITIK DER URTEILSKRAFT 439, n.\* (1974) ("A law of reason cannot bind an ultimate end unless there is a reasonable guarantee of the possibility, however remote, of compliance...").

<sup>42</sup> See *Ethical Consistency*, *supra* note 1. See also Ruth Barcan Marcus, *More about Moral Dilemmas*, MORAL DILEMMAS AND MORAL THEORY 23, 26 (H.E. Mason, ed., 1996) ("Of the contemporary moral philosophers, Bernard Williams is the one who has noted the contingent origin of dilemmas and seen most clearly that there should be a way of squaring dilemmas with consistency of moral codes.") See generally

reflection, in the best of cases, suggests which of the duties one should uphold, but does not completely extinguish the force of the disregarded commitment.<sup>43</sup> For Williams, it is this moral residue that explains the moral agent's sense of regret in these situations.<sup>44</sup>

Williams imagines the following scenario. I promise a friend to meet him for lunch, but witness a terrible accident on my way. I realize that I have to come to the victim's aid even if doing so will cause me to miss my appointment. Though the decision to skip my previous engagement is morally correct, my obligation to my friend does not simply disappear. I have broken a promise, albeit for a good reason, and in a sense failed him. I will feel that I owe it to him to try to make it up to him. I may very well call him up, apologize, reschedule, and even offer to pick up the tab next time.<sup>45</sup>

Peter Railton correctly notes that in this case there is no "real dilemma", in spite of the fact that the person in question is sorry "for the inconvenience that, knowingly, he has caused."<sup>46</sup> The loss has to be much greater if there is to be a profound moral conflict. All the same, the cited example does present the *indicia* of an authentic dilemma. If the

MORAL DILEMMAS (Christopher W. Gowans, ed., 1987); MORAL DILEMMAS AND MORAL THEORY (H.E. Mason, ed., 1996).

<sup>43</sup> *Ethical Consistency*, *supra* note 1, at 179. Marcus similarly believes that "even where principles, including priority principles, favor one alternative in a dilemma, the original obligation with respect to the other is not erased." Ruth Barcan Marcus, *More about Moral Dilemmas*, MORAL DILEMMAS AND MORAL THEORY 23, 23 (H.E. Mason, ed., 1996). *See also* Ruth Barcan Marcus, *Moral Dilemmas and Consistency*, MORAL DILEMMAS 188 (Christopher W. Gowans, ed., 1987) ("That is, wherever the circumstances are such that an obligation to do x and an obligation to do y cannot as a matter of circumstance be fulfilled, the obligations to do each are not erased, even though they are unfulfillable."). According to Mothersill, "Williams and Marcus are correct in observing that where an all-things-considered decision precludes the discharge of a *prima facie* obligation, the latter is not thereby erased." Mary Mothersill, *The Moral Dilemmas Debate*, MORAL DILEMMAS AND MORAL THEORY 66, 78 (H.E. Mason, ed., 1996).

<sup>44</sup> *Ethical Consistency*, *supra* note 1, at 172. "Regret, here," Marcus complains, "is too weak a description of the accompanying moral sentiment. Something closer to remorse is more appropriate." Ruth Barcan Marcus, *More about Moral Dilemmas*, MORAL DILEMMAS AND MORAL THEORY 23, 33 (H.E. Mason, ed., 1996).

<sup>45</sup> *Ethical Consistency*, *supra* note 1, at 175. Railton notes that "obligation, and especially 'living up to' our obligations or respecting those to whom they are owed, are complex and partly symbolic matters, with many routes to reconciliation and the mitigation of moral residue." Peter Railton, *The Diversity of Moral Dilemma*, MORAL DILEMMAS AND MORAL THEORY 140, 159 (H.E. Mason, ed., 1996).

<sup>46</sup> *Id.* at 154-55.

neglected obligation were of monumental significance, the case would indeed be morally devastating. For instance, I may have pledged to provide an alibi against the criminal charges facing my friend. I am in a bind, even if there is no doubt in anybody's mind that I should skip the trial in order to help out in the catastrophic emergency that I have encountered.<sup>47</sup>

Williams generally believes that the tendency to view morality as a closed cognitive system and to equate the conflicts of duties with those of beliefs leads to a mischaracterization of moral conflict.<sup>48</sup> He criticizes philosophers for assuming that if a person thinks a moral problem through, she will arrive at a clear solution, and that if she acts accordingly, she will be entirely beyond reproach. He cautions against treating moral dilemmas as cases in which there only seems to be a collision of duties. He specifically rejects the view that, in these cases, one of the competing obligations must ultimately turn out to be just an apparent or perhaps *prima facie* duty, in the words of William David Ross.<sup>49</sup> Williams protests that this approach does not take moral conflict seriously and remarks that "it is certainly a falsification of moral thought to represent its logic as one that demands that in a conflict situation one of the duties encountered must be totally rejected."<sup>50</sup>

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<sup>47</sup> I therefore disagree with Mary Mothersill who maintains that when the ultimate decision is of the kind "in which all right-thinking people concur", one should not call the situation a dilemma. Mary Mothersill, "The Moral Dilemmas Debate," MORAL DILEMMAS AND MORAL THEORY 66, 66 (H.E. Mason, ed., 1996). See also Terrance C. McConnell, *Moral Residue and Dilemmas*, MORAL DILEMMAS AND MORAL THEORY 36, 42 (H.E. Mason, ed., 1996)

<sup>48</sup> *Ethical Consistency*, *supra* note 1, at 170-75.

<sup>49</sup> *Id.* at 175-76 (citing W.D. Ross, *THE FOUNDATION OF ETHICS* 84ff (1938)). Cf. Ruth Barcan Marcus, *More about Moral Dilemmas*, MORAL DILEMMAS AND MORAL THEORY 23, 24 (H.E. Mason, ed., 1996) ("W.D. Ross also denied the reality of moral dilemmas but takes pains to give us an account of them.").

<sup>50</sup> *Ethical Consistency*, *supra* note 1, at 183.

The eagerness to explain away cases in which norms appear to clash is as problematic in political as it is in moral philosophy.<sup>51</sup> When these situations emerge in political life, it is misleading to say that if the community deliberately and correctly sides with one of the principles, the other either does not apply or is no longer binding.<sup>52</sup> One should rather recognize that the society might have, to some extent, failed to uphold its obligations. The polity may go through internal turmoil and have a duty to make amends, despite having made the right choice. Lawrence Kohlberg emphasizes that it is precisely when they confront dilemmas that individual demonstrate and develop their moral knowledge.<sup>53</sup> Similarly, it is in facing up to normative conflict that communities display and enhance their political wisdom.

Of course, classic dilemmas, in which neither of the competing principles prevails, are also possible. They are quandaries in the sense envisaged by Simon Blackburn. In other words, they present “a number of alternatives, of which you must adopt one and only one, but where you do not know which one to adopt.”<sup>54</sup> They involve, as Walter Sinnott-Armstrong points out, “symmetrical or incomparable

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<sup>51</sup> Marcus suggests that these conflicts affect politics far more than morals. “In political life,” she writes, “dilemmas may be virtually certain to occur and dirty hands may be an inevitability.” Ruth Barcan Marcus, *More about Moral Dilemmas*, MORAL DILEMMAS AND MORAL THEORY 23, 29 (H.E. Mason, ed., 1996).

<sup>52</sup> Schlink objects specifically to the harmonization of public and private autonomy. “A theory of the democratic state,” he admonishes, “should not conflate the state’s constitutive elements ... so that they are no longer self-standing.” Bernhard Schlink, *Abenddämmerung oder Morgendämmerung: Zu Jürgen Habermas’ Diskurstheorie des demokratischen Rechtsstaats*, 12 RECHTSHISTORISCHES JOURNAL 57, 60 (1993). Schlink proposes that dilemmas—such as those resulting from the possibility “that more private autonomy might lead to more social misery or that more public autonomy might intensify ethnic identity and undermine social peace”—“call for (at best) compromises in the arrangement of the state’s constitutive elements....” *Id.*

<sup>53</sup> See generally, Lawrence Kohlberg, *Resolving Moral Conflicts within the Just Community*, MORAL DILEMMAS: PHILOSOPHICAL AND PSYCHOLOGICAL ISSUES IN THE DEVELOPMENT OF MORAL REASONING 71 (Carol Harding, ed., 1985).

<sup>54</sup> Simon Blackburn, *Dilemmas: Dithering, Plumping, and Grief*, MORAL DILEMMAS AND MORAL THEORY 127, 127 (H.E. Mason, ed., 1996).

[requirements].”<sup>55</sup> They are tragic, according to Williams,<sup>56</sup> and most clearly lead to distress, to residue, and to a need for compensation. I have nonetheless chosen to focus on cases with a reasonable solution in order to underscore that dilemmas do not hinge upon the impossibility of a principled decision.

It may seem that political dilemmas defy the logic of obligations. On the one hand, if a community ought to do A and carrying B out prevents it from realizing A, then it appears to have a duty not to execute B. It therefore seems, necessarily, not to have an obligation to perform both A and B. On the other hand, if a community has an obligation to do A and an obligation to do B, it also appears to have a duty to attain both A and B. This latter duty suggests that it must be possible to accomplish A and B simultaneously. Consequently, it seems that a polity may not face a real dilemma with respect to two obligations.<sup>57</sup>

However, deontic logic is trickier than it appears. A political duty imports a general obligation to undertake actions to make meeting that duty possible. It does not imply a specific obligation to achieve any one of those acts. To say that society should carry out B does not entail that it should not execute A, just because A is contingently incompatible with B. Hence, to affirm that society should do A and should do B is not equivalent to asserting that it should and should not do A.

For instance, a community’s obligation to assist its disabled members does not strictly implicate a duty to refrain from remedying racial discrimination, just because a

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<sup>55</sup> Walter Sinnott-Armstrong, *Moral Dilemmas and Rights*, MORAL DILEMMAS AND MORAL THEORY 48, 53 (H.E. Mason, ed., 1996).

<sup>56</sup> *Ethical Consistency*, *supra* note 1, at 74.

<sup>57</sup> See Terrance C. McConnell, *Moral Residue and Dilemmas*, MORAL DILEMMAS AND MORAL THEORY 36, 36 (H.E. Mason, ed., 1996) (“One version of the conceptual argument [against moral dilemmas] appeals to two principles: that ‘ought’ implies ‘can’ and that if an agent ought to do each of two acts then he ought to do both acts.”).

tight budget requires making a choice between these two commitments. I am assuming a dramatic and unforeseeable situation in which transferring additional money to the single fund devoted to these two functions is no longer an option. Under these circumstances, this year's decision to neglect racial oppression in order to accommodate disability may reasonably rest on the fact that for the past ten years the former issue has received considerable financial attention and the latter none. Needless to say, the polity should make broader fiscal adjustments so as to be able to meet these two obligations next year.<sup>58</sup> All the same, it ought to aid the disabled and it ought to combat discrimination now, even though it cannot presently do both.

Moreover, what Williams' terms "the agglomeration principle" is as inappropriate in political as it is in moral philosophy.<sup>59</sup> This notion establishes that a duty to do A plus a duty to do B import a duty to realize A and B. It entails, in conjunction with the previously mentioned possibility requirement, that there cannot be an obligation to do A and an obligation to do B, if A and B are not simultaneously attainable. For an obligation to do A and an obligation to do B lead to a duty to perform A and B, which requires that the accomplishment of both A and B be possible.

In fact, a duty to do A and a duty to do B does not imply an obligation to undertake both together. To return to my previous example, the duty to fund disability

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<sup>58</sup> "Although dilemmas are not settled without residue," Marcus reasons, "the recognition of their reality has a dynamic force. It motivates us to arrange our lives and institutions with a view to avoiding such conflicts." Ruth Barcan Marcus, *Moral Dilemmas and Consistency*, MORAL DILEMMAS 188 (Christopher W. Gowans, ed., 1987). See also Ruth Barcan Marcus, *More about Moral Dilemmas*, MORAL DILEMMAS AND MORAL THEORY 23, 28 (H.E. Mason, ed., 1996) ("Still, in troublesome dilemmas we often wish we could have avoided the emergence of such a predicament, and we often do take steps, to the extent that it is possible, to avoid them in the future."). Marcus concludes "that as rational agents with some control of our lives and institutions, we ought to conduct our lives and arrange our institutions so as to minimize predicaments of moral conflict." Ruth Barcan Marcus, *Moral Dilemmas and Consistency*, MORAL DILEMMAS 188 (Christopher W. Gowans, ed., 1987).

programs and the duty to finance measures against racial discrimination do not import an obligation to achieve both at the same time. The two obligations are perfectly realizable independently. They may be impossible to carry out simultaneously, but there is no requirement to bring about this impossibility.

These conflicts do not necessarily suggest that the community's political principles are incoherent. It is not the principles themselves that collide, but rather their applications. Therefore, the polity may continue to adhere with equally reasonable conviction to both norms despite these dilemmas.

Of course, one of the applicable principles requires undertaking specific action and society is explicitly balking. Collective regret and compensation cannot change this fact. The community seems to have turned its back on the norm and to have taken the attitude of erstwhile colonial bureaucrats towards edicts from Spain: "I obey, but I don't comply."<sup>60</sup>

There is no need to judge the polity so harshly. In these cases, it has an excuse, though not a justification, for neglecting its obligation. It may, therefore, reluctantly neglect the requirements of the principle in question due to the extenuating circumstance, while holding on to the principle itself. More importantly, the excuse does not extinguish the claims of others. Dissidents may legitimately stand up against the polity and demand

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<sup>59</sup> Marcus refers to this notion as the "deontic principle of factoring." Ruth Barcan Marcus, *More about Moral Dilemmas*, MORAL DILEMMAS AND MORAL THEORY 23, 28 (H.E. Mason, ed., 1996).

<sup>60</sup> See Mark J. Osiel, *Obedying Orders: Atrocity, Military Discipline, and the Law of War*, 86 CALIF. L. REV. 939, n.718 (1998) ("When they realized that local conditions made orders from home ill-considered, Spanish colonial administrators in the New World often skirted them, with the maxim 'se obedece, pero no se cumple.' CHARLES GIBSON, SPAIN IN AMERICA 94 (1966) (providing the history of this maxim). Literally, 'one obeys, but does not comply.' *Id.* The meaning of the phrase is as follows: 'I do not challenge your authority to issue such orders, but will exercise discretion in determining how to implement them, including the extent to which any implementation is possible and appropriate, given your larger objectives in the colony, all things considered.'").



satisfaction. They would have no entitlement to either of these options if the collectivity's breach were justifiable.

John L. Austin painstakingly distinguishes justification and excuse as defenses. "In the one defence, briefly, we accept responsibility but deny that [what we did] was bad: in the other, we admit that it was bad but don't accept full, or even any, responsibility."<sup>61</sup> Criminal law presents explicitly this contrast between justification and excuse. George P. Fletcher articulates the dichotomy thus.

Claims of justification concede that the definition of the offense is satisfied, but challenge whether the act is wrongful; claims of excuse concede that the act is wrongful, but seek to avoid the attribution of the act to the actor. A justification speaks to the rightness of the act; an excuse, to whether the actor is accountable for the concededly wrongful act.<sup>62</sup>

Fletcher contends that Germany's legal system establishes this dichotomy most clearly. He notes that "the distinction between justification and excuse has never received the kind of attention in Anglo-American law that it has in the German legal tradition."<sup>63</sup>

A person who slays another in self-defense has a justification. She has a right to her act and the law bans all interference with her exercise of her prerogative. In contrast, someone who kills out of necessity to prevent a deadly harm to herself or others simply has an excuse.<sup>64</sup> She has no right and the penal code condemns (though does not punish) her actions.<sup>65</sup> Furthermore, she may have to make amends for what she has done. She

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<sup>61</sup> JOHN L. AUSTIN, PHILOSOPHICAL PAPERS 176 (1970). "Hence, if somebody says he blames me for something, I may answer by giving a *justification*, so that he will cease to disapprove of what I did, or else by giving an *excuse*, so that he will cease to hold me, at least entirely and in every way, responsible for doing it." *Id.* at 181 n.1.

<sup>62</sup> GEORGE P. FLETCHER, RETHINKING CRIMINAL LAW 759 (1979).

<sup>63</sup> *Id.* at 767.

<sup>64</sup> Austin offers two different examples. He notes that the objection to a murder charge "may be on the ground that the killing was done in battle (justification) or on the ground that it was only accidental if reckless (excuse)." JOHN L. AUSTIN, PHILOSOPHICAL PAPERS 176-177 (1970).

<sup>65</sup> The German Penal Code establishes the following. "Whoever commits a wrongful act in order to avoid an imminent and otherwise unavoidable danger to life, limb, or liberty to himself, a dependent, or someone

may have to pay damages to the relatives of her victim. The reason is that, as Austin declares, “few excuses get us out of it *completely*: the average excuse, in a poor situation, gets us only out of the fire into the frying pan—but still, of course, [a] frying pan in a fire.”<sup>66</sup>

Analogously, a community that disregards one of its duties in the face of a dilemma has no right to proceed thus because it merely has an excuse.<sup>67</sup> Others may legitimately stand up against the breach and demand satisfaction. They may not, however, block the polity in its fulfillment of its other, conflicting obligation. Therefore, they may only press it to eliminate the source of the conflict.

My earlier example may help clarify this point. Racial minorities are entitled to remonstrate against and seek compensation for the community’s decision to cut funding of measures to combat racial discrimination. Yet, they have no right to require the polity to slash its disability programs. They may only call upon it to come up with the needed

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close to him acts without culpability.” StGB § 35(1) (Germany). The French Penal Code takes a similar approach in two separate articles, though it does not declare, but rather implies the wrongfulness of the act in question. “A person who acts impelled by an irresistible force or constraint shall not be criminally responsible.” Art. 122-7 Code Pénal. “A person who faces a present and imminent danger to herself, to someone else, or to a good and commits an act necessary for the protection of the person or good under threat shall not be criminally liable.” Art. 122-7 Code Pénal (France). The Brazilian Code also relies on two provisions and steers clear of labeling the act as wrongful. “There is no crime when the agent acts... in a case of necessity.” Art. 23(I), Código Penal (Brazil). “Someone is deemed to face a case of necessity if he acts to protect his right or that of someone else from a present danger, which the agent did not himself voluntarily create. The right may not be one that the agent would be reasonably expected to sacrifice under the circumstances.” Art. 24, Código Penal (Brazil). Mexican law coincides on this point, yet introduces a utilitarian overtone. “There is no crime... when someone acts out of necessity to protect his own legal right or that of someone else against a real, present, or imminent danger, which the agent did not himself maliciously create, and thereby violates another right of less or equal value. The danger may not be one that is avoidable by other means or one that the agent has a legal duty to assume.” Art. 15(V), Código Penal Federal (Mexico).

<sup>66</sup> JOHN L. AUSTIN, PHILOSOPHICAL PAPERS 177 (1970).

<sup>67</sup> “Claims of justification,” according to Fletcher, “divide themselves into those that are essentially private, and those that are exercised in the name of government or the community as a whole.” GEORGE P. FLETCHER, RETHINKING CRIMINAL LAW 771 (1979). Claims of excuse presumably have a communal dimension too.

resources without violating its other duties. They may, for instance, demand that it take a loan, eliminate some of its superfluous expenses, or raise taxes.

Criminal law distinguishes justification and excuse in terms of their relationship to the underlying norm. “The nature of a justification,” according to Fletcher, “is that the claim is grounded in an implicit exception to the prohibitory norm.”<sup>68</sup> Fletcher contrasts excuses on this point.

Excuses bear a totally different relationship to prohibitory norms. They do not constitute exceptions or modifications of the norm, but rather a judgment in the particular case that an individual cannot be held accountable for violating the norm.<sup>69</sup>

Similarly, a political community in the midst of a dilemma must ultimately disregard one of the principles at stake without the protection of an exception.<sup>70</sup> It may only point to mitigating factors in order to excuse its transgression.

Advocates of perfect normative harmony in political philosophy could, of course, concede that in these situations it is difficult to arrive at correct decisions. They could also accept that the solution will require all the qualifications and reparations that I have mentioned. They might assert, for instance, that there is a duty fully to fund agencies that combat racial oppression, except when society has neglected disability programs for several years. They might additionally maintain that whenever an exception arises, the community has an obligation to apologize, compensate, and ensure it has adequate resources for both purposes in the future.

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<sup>68</sup> *Id.* at 810.

<sup>69</sup> *Id.* at 811.

<sup>70</sup> Fletcher suggests that “it might be preferable to treat the category of inconsistent duties as a special category of exemption, rather than as a case of excused wrongdoing.” *Id.* at 855. Irrespective of the categorization, the agent violates one of the underlying norms compelled by the circumstances, does not enjoy the benefit of an exception, experiences regret, and must provide satisfaction.

It is crucial to keep this possibility in mind in order to avoid caricaturizing the position of those who believe in a seamless system of political principles. However, it is just as necessary to note that assimilating the vexation in these cases to that generated by a complicated math problem misses the mark. The mathematical question troubles only insofar as it defies a solution. In contrast, the distress associated with political dilemmas does not result from the difficulty of finding the correct answer. The community goes through internal turmoil even if it knows right away what it must do.

Moreover, those who do not believe in political dilemmas would have to explain why the community owes an apology or perhaps even satisfaction.<sup>71</sup> Of course, they may contend that the community is to blame for failing to plan in order to be able to meet both its obligations. Yet, it might have ended up in a bind unexpectedly and in spite of its thoroughly responsible behavior.<sup>72</sup> For instance, it might have ended up with a tighter real budget because international speculators brought about a devaluation of its currency as well as inflation.

On the one hand, the duty to make amends should not hinge on the contingency of being able to establish communal culpability, particularly in light of the complications involved in attributing blame to groups. On the other hand, the feeling of collective

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<sup>71</sup> Blackburn insists that “apology and even reparation may be in order when no requirements have been violated, and even when no quandary ever existed.” Simon Blackburn, *Dilemmas: Dithering, Plumping, and Grief*, MORAL DILEMMAS AND MORAL THEORY 127, 132 (H.E. Mason, ed., 1996). I would agree with this statement in light of Blackburn’s own definitions. By requirement he means an overriding imperative. “To identify a requirement is then to give an outright verdict.” *Id.* at 134. As previously noted, he takes quandaries to represent situations in which the agent does not know which of the alternatives to choose. Under these definitions, the case at hand involves neither a violation of a requirement nor a quandary. All the same, the need for an apology suggests blameworthiness, just as the compensatory duty calls for a special justification.

<sup>72</sup> “There is no reason to suppose, this being the actual world, that we can, individually or collectively, however holy our wills or rational our strategies, succeed in foreseeing and wholly avoiding conflict. It is not merely failure of will or failure of reason, which thwarts moral maxims from becoming universal laws. It is the contingencies of the world.” Ruth Barcan Marcus, *Moral Dilemmas and Consistency*, MORAL DILEMMAS 188, 199 (Christopher W. Gowans, ed., 1987).

regret and the sense that there is an obligation to compensate, despite the absence of guilt, are in no way inappropriate. Nor are they confused manifestations of the sympathy experienced in light of the racial minorities' bad luck. In the case at hand, the polity faces a different situation than when it perceives natural adversity afflicting some of its constituents or when it makes one of its subgroups worse-off in its ordinary (and fully unproblematic) course of action.

Consequently, the following four scenarios give rise to different communal feelings and obligations. The first community becomes aware that recent storms have caused considerable damages to some of its citizens. A second community suppresses the freedom of expression of its dissidents simply because it does not take criticism well. A third polity imposes a heavy tax, which will be extremely burdensome on its wealthiest members, in order to rebuild its railways. The fourth polity neglects its promise to build a park in one of its neighborhoods upon realizing that it needs the funds to provide housing for the poor.

Only the last community runs into a political dilemma. It differs from the first because it bears causal responsibility; from the second, because it acts legitimately; and from the third because it disregards a crucial duty. Those who discard the possibility of conflicting political obligations would perhaps insist on conflating the third and the fourth cases. I am arguing instead for the meaningfulness of the distinction. Furthermore, I am contending that in the fourth example, as opposed to the third, the polity appropriately feels regret and has a duty to provide satisfaction. The reason is that the community has failed to keep its word.

The duty to compensate despite the absence of culpability is not as unusual as it might seem. It is rather commonplace in torts. The law often holds products companies strictly liable for the damages they cause, even if they show that they have conducted themselves impeccably. Obviously, causation does not in itself justify liability, but rather in conjunction with the notion that manufacturers should internalize production costs, should have an incentive efficiently to invest in prevention, or should draw on their deep pockets to indemnify the victims. By the same token, a political community's obligation to repair under the cited circumstances does not ride exclusively on its causal responsibility, but also on its violation of a valid principle.

I would like to introduce three caveats to my recognition of the possibility of political dilemmas. First, while one should not altogether write off these conflicts, one should not overestimate them either. If a community were in such dire straits all the time, it would be hopelessly (and perhaps culpably) dysfunctional.<sup>73</sup> Just as G.W.F. Hegel dismisses the view that collisions are a pervasive feature of moral experience,<sup>74</sup> one

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<sup>73</sup> Railton provides a similar argument against the exaggeration of moral dilemma. "To take an extreme case, if fundamental clashes of value and obligation were the stuff of daily life, such that moral principles seldom provided any definite guidance—except perhaps to license unremitting guilt for what one cannot avoid—there would be little prospect for the moral life as a source of allegiance or as a way of understanding oneself and one's place in the world. Ordinary moral thought would seem to leave one abandoned, and one would have to plunge ahead on one's own." Peter Railton, *The Diversity of Moral Dilemma*, MORAL DILEMMAS AND MORAL THEORY 140, 161 (H.E. Mason, ed., 1996).

<sup>74</sup> Hegel accuses Kantian moralists of exaggerating the prevalence of conflict in ethics for their own self-satisfaction. "The moral reflection can concoct all kinds of collisions and give itself a consciousness of being special and *making sacrifices*." G.W.F. HEGEL, GRUNDLINIEN DER PHILOSOPHIE DES RECHTS ODER NATURRECHT UND STAATSWISSENSCHAFT IM GRUNDRISSE, Werke, Bd. 7, (Suhrkamp, Frankfurt am Main, 4. Aufl. 1995), at § 150A. According to Hegel, in modern society true moral collisions are rare. *Id.* at §§ 137N, 150A. True moral collisions pit morality not against inclination, as Kant would have it, but rather against morality itself. Hegel believes that in underdeveloped societies true collisions occur more frequently than in modern society. The individual's virtuousness is then put to test. Modern society, in Hegel's view, has attained an ethical life that is rational and complete. The ethical demands rarely clash. Individuals can play their ethical role in the community without running into dilemmas: "In an existing ethical order, whose relations are fully developed and realized, *actual virtue* has its place and reality only under extraordinary circumstances when there are collisions between those relations—i.e., true *collisions*." In modernity virtue mostly overlaps with "rectitude", i.e., "the individual's simple fulfillment of the duties imposed on her by the relations in which she belongs." *Id.* at § 150. Presumably, the obligations imposed

should reject any position that exaggerates the frequency of normative conflict in politics. While they do take place and deserve serious consideration, principled dilemmas are not part of every question that emerges in political life.

Second, I have completely sidestepped the all-important epistemological dimension of this problem. How does a political community know that it faces a dilemma? What if it merely thinks that it is in a predicament because it is not aware of an exception to one of the competing principles? If it is confronting a real conflict between duties, how does it find out which of them prevails? I have avoided these questions not simply because I am in enough of a pickle as it is. Another reason is that the ontological matters with which I am preoccupied are preliminarily separable and basic. Needless to say, a complete assessment of the issue would require delving into epistemology.<sup>75</sup>

Finally, my acknowledgement of political dilemmas does not entail a reduction of principles to values. While I accept a distinction between the two categories, I would not draw it as rigidly as Habermas proposes. Nor would I vest as much in it as he does. I would simply say that norms suggest concrete actions more immediately, and take the form of rules more readily, than values. For instance, I would classify freedom of expression as a principle, and patriotism as a value.

I would agree that norms are deontological, rather than teleological. However, I would deny that their “validity claim [necessarily] has a binary coding [instead of] a gradual coding.”<sup>76</sup> Democracy is a principle, which requires communities to follow

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by a rational ethical system will collide not because of internal contradictions, but rather external circumstances.

<sup>75</sup> For a discussion of dilemmas that focuses on epistemological issues see Simon Blackburn, *Dilemmas: Dithering, Plumping, and Grief*, MORAL DILEMMAS AND MORAL THEORY 127 (H.E. Mason, ed., 1996).

<sup>76</sup> HABERMAS, *supra* note 3, at 311.

certain procedures in arriving at their decisions. Yet, one may reasonably assert that a particular society or policy is more democratic than another one.

I would also contest the absolute universality of political norms. Such norms emerge in the context of a particular society. To be sure, they may apply extraterritorially. Nonetheless, the farther the application takes place from the point of origin, the less sense it will make. The right to a fair trial, for example, would seem to be of little relevance in a stone-age society, with no judicial or even legal institutions. Of course, nowadays many key political principles are part of the international community and are, as such, applicable to all nations.

Needless to say, I would similarly reject the assertion that political norms must always be in harmony. Throughout this section, I have been contending that they may at times conflict. Yet, the fact that they may collide—or, for that matter, that they need not constitute a binary benchmark or be universal—does not mean that they are identical to values.

In sum, political principles, such as democracy and human rights, may come into collision. Rather than denying this conflict, political philosophy should seek to understand it. This approach would not preclude proposing a principled manner of choosing between the two norms. What it would suggest is that once a polity decides what to do, the conflict may not disappear. In particular cases, the option for one norm may take place at the expense of the other and, in the end, there may be an ineluctable sense of loss.<sup>77</sup> The political community, in addition to feeling regret for turning its back

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<sup>77</sup> “This inevitable sense of loss,” explains Peter Railton in the context of morality, “seems to characterize a great part of our thought about moral dilemmas, even when the loss or the decision in question is not, or is not entirely of the type in which obligations cease to be fulfilled.” Peter Railton, *The Diversity of Moral Dilemma*, MORAL DILEMMAS AND MORAL THEORY 140, 148 (H.E. Mason, ed., 1996).



on one of its crucial convictions, should seek to make amends for its failing. It is thus able to express its continued alliance to the overridden norm.

Political dilemmas do not connote incompatibility or incommensurability between the principles themselves. At stake is simply a conflict in their application. In a particular context, the norms point to two specific duties that the community cannot fulfill at the same time.

Deontic logic in no way precludes this kind of predicament. The fact that the community has an obligation to perform one act and that carrying out a second act prevents it from executing the first, does not imply that it may not have a duty to attain or that it has a duty not to achieve the second one. Furthermore, having these two duties does not entail a general obligation to accomplish both simultaneously.

What does my intervention contribute to the debate on dilemmas? First and foremost, it proposes an extension from the realm of morals to that of politics. Second, it offers a clean way out of apparent logical difficulties by rejecting separately the duty to fulfill independent obligations in agglomeration and the duty to refrain from any act incompatible with what ethics requires. Third, it connects in the dichotomy between justification and excuse in order to explain the continued adherence to a principle despite a deliberate violation. Fourth, it calls attention to the dangers of exaggerating the incidence of conflict. The next section advances the discussion further by putting forth, very briefly, a series of illustrative examples.

#### IV. Three Examples: Orangemen, Quebec Anglophones, and Surrogate Mothers

My first example refers to the 1998 dispute between British authorities and the Orange Order in Northern Ireland. I will put aside the issue that the Northern Irish community was neither acting autonomously in general nor calling the shots itself in this affair. Disregarding this most fundamental matter will simplify making my point and will not affect the essence of my argument.

On July 12, 1998, the Orangemen requested permission to march through the neighborhood of Drumcree along Garvaghy Road, where the population is mostly Catholic. They wanted to walk all the way to the center of Portadown, the town (southeast of Belfast) that witnessed the Orange Order's foundation in 1795.<sup>78</sup> Members of the Order had been parading by this route since 1807,<sup>79</sup> celebrating the triumph of the Protestant William of Orange over his Catholic father-in-law King James II in the 1690 Battle of Boyne.<sup>80</sup> This military victory established Protestant supremacy and British domination in Ireland.<sup>81</sup>

In 1998 the British authorities, through the Commission of Parades, prohibited the demonstration.<sup>82</sup> This determination led to an obstinate confrontation between the Orangemen and the authorities. The dispute ended tragically with the burning down of a

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<sup>78</sup> Juan Carlos Gumucio, *Los protestantes mantienen su marcha en Ulster*, EL PAIS, July 1, 1998, at 5; Agence France Presse, *Dos siglos de marchas*, EL PAIS, July 5, 1998, at 2.

<sup>79</sup> Juan Carlos Gumucio, *Los orangistas del Ulster acampan ante el cordón militar en Portadown*, EL PAIS, July 6, 1998, at 1-2.

<sup>80</sup> Juan Carlos Gumucio, *Cuenta atrás para nuevos enfrentamientos en el Ulster tras fracasar la mediación de Blair*, EL PAIS, July 1, 1998, at 2.

<sup>81</sup> See James F. Clarity, *Northern Ireland Relatively Calm as Protestant Marchers are Kept From Catholic Area*, N.Y. TIMES, July 6, 1998, at A4.

<sup>82</sup> Juan Carlos Gumucio, *Los orangistas acuden divididos a su decisiva reunión con Blair*, EL PAIS, July 9, 1998, at 5.

house in Ballymoney, in the north of Ulster, and the death of three Catholic children.<sup>83</sup>

Since then, the showdown between the Order of Orange and the London government has become something of a summer tradition. Fortunately, there have been no other similarly deadly denouements.

There are, at least, four angles from which to view this political tragedy. First, one might perceive a conflict between the commitment to peace and the Orangemen's freedom of expression. Second, one might divine a clash between the will of the Protestant majority and the rights of the Catholic minority. A third possibility would be to postulate a collision of human rights: those of the Orangemen and those of Dumcree's Catholic community. Finally, one might suggest that there were two conflicting expressions of popular sovereignty: one in favor of peace and one committed to honoring North Ireland's ties with the United Kingdom.

This range of possible interpretations shows the complexity of the situation as well as the ineluctable distortion any kind of philosophical analysis entails. All the same, I focus (in a somewhat simplistic manner) on the clash between Catholics' rights and the Order's free speech. I presume not only that the demonstration would have constituted an affront and humiliation for the Catholic neighbors, but also that the prohibition was legitimate. Finally, I assume that the Order of Orange possessed less aggressive ways to express its loyalist pride and that the procession would have had destructive and irremediable consequences for the peace effort.

In light of these premises, the supporters of absolute normative harmony in politics would simply recommend proceeding with the prohibition. They would deem

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<sup>83</sup> James F. Clarity, *3 Catholic Brothers Killed in Fire, Stunning Ulster and Raising Fears*, N.Y. TIMES, July 13, 1998, at A1; Juan Carlos Gumucio, *Extremistas protestantes del Ulster queman vivos a tres niños*

ridiculous any regrets about the decision. They would insist that, appearances notwithstanding, the Orangemen simply had no right to march.

This approach, though straightforward, is hardly satisfactory. On the one hand, it gives the impression that the anguish in this case was merely the product of the deciding authority's *akrasia* (that is, weakness of will) or of the zealousness of the proscribed. On the other hand, it completely disregards the intuition that the British government's measures, in spite of their legitimacy, might have undermined the radical Protestants' liberties in some manner.

Recognizing that the collective trauma stemmed from a principled controversy and that the adopted policy violated certain fundamental norms would be more sensible. One should attempt not to discard but rather to explain the feeling that the official decision infringed upon the Orangemen's long-established prerogatives, especially their liberty to express their views. This reaction becomes more intense with the realization that this extremist group in that moment became a minority within a community in the process of reconciliation.

The perceived need to provide satisfaction explains, to some extent, British Prime Minister Tony Blair's meeting with the Orange Order's representatives, as well as the desperate and ultimately unsuccessful attempt to find a compromise.<sup>84</sup> There was, of course, a strategic dimension to the mediation efforts, since there was a desire to avoid violence at all costs. Nevertheless, there also was an ethical factor crucially at play.

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*católicos mientras dormían*, EL PAIS, July 13, 1998, at 1-2.

<sup>84</sup> Juan Carlos Gumucio, *Blair acepta negociar con los unionistas radicales y envía mas tropas al Ulster*, EL PAIS, July 8, 1998, at 8; *Cuenta atrás para nuevos enfrentamientos en el Ulster tras fracasar la mediación de Blair*, EL PAIS, July 1, 1998, at 2.

I will now reflect upon a case in which democracy and human rights clash. More specifically, a legitimate exercise of democratic will runs against the rights of a minority. Such a predicament arises when a culturally menaced polity devotes itself to intensely defending the national culture against the wishes of ethnic and dissident factions.

Charles Taylor argues that although a political community should respect all its members' fundamental human rights, it has no obligation to exhibit total neutrality in questions of national culture.<sup>85</sup> Taylor is, of course, thinking of Quebec. His position is that the provincial government has the right to protect and promote French Canadian culture in Quebec, as long as it does not undermine the basic liberties of the English-speaking minority.<sup>86</sup>

Accordingly, the government is entitled to foment the national language. It may thus require primary education in French for French-Canadians as well as for non-Canadian immigrants.<sup>87</sup> It may similarly compel large public corporations to conduct

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<sup>85</sup> Charles Taylor, *The Politics of Recognition*, MULTICULTURALISM AND 'THE POLITICS OF RECOGNITION' 58 (1992) ("Political society is not neutral between those who value remaining true to the culture of our ancestors and those who might want to cut loose in the name of some individual goal of self-development.") [hereinafter Taylor, *The Politics of Recognition*]. See also CHARLES TAYLOR, RECONCILING THE SOLITUDES: ESSAYS ON CANADIAN FEDERALISM AND NATIONALISM 174-176 (Guy Laforest, ed., 1993) [hereinafter TAYLOR, RECONCILING THE SOLITUDES]. According to Taylor, such a society respects the basic demands of liberalism and is therefore legitimate. Taylor explains that "a liberal society singles itself out as such by the way in which it treats minorities, including those who do not share public definitions of the good, and above all by the rights it accords to all its members. But now the rights in question are conceived to be the fundamental and crucial ones that have been recognized as such from the very beginning of the liberal tradition: rights to life, liberty, due process, free speech, free practice or religion, and so on." Taylor, *The Politics of Recognition*, *supra*, at 59. See also TAYLOR, RECONCILING THE SOLITUDES, *supra*, at 176. "A society with strong collective goals can be liberal," warns Taylor, "provided it is also capable of respecting diversity, especially when this concerns those who do not share its goals, and provided it can offer adequate safeguards for fundamental rights." *Id.* at 177. These rights find substance not only in international law but also in Quebec's political culture. Taylor affirms that "the fusion of liberal democracy and national identification is as complete in Quebec today as it is in any other western society." *Id.* at 99. See also *id.* at 155-56.

<sup>86</sup> Taylor explains that the position of Quebec is that "a society can be organized around a definition of the good life, without this being viewed as a depreciation of those who personally do not share this definition." Taylor, *The Politics of Recognition*, *supra* note 78, at 59.

<sup>87</sup> *Id.*, at 52. "The aim is not only that francophones be served in French but that there still be francophones there in the next generation... Indeed, pursuing it may even involve reducing their individual choice, as Bill

business in French,<sup>88</sup> outlaw “commercial signage in any language other than French,”<sup>89</sup> and favor the immigration of Francophones. What it may not do is, for example, force individuals to speak French among themselves or refuse to provide Anglophone criminal defendants with interpreters.

The political dilemma stems from the fact that cultural partiality, even when legitimate, leaves an ethical residue. Propagating the national culture results in an infringement upon the principle of non-discrimination. To be sure, state officials have a right, perhaps even a duty, to implement their culturally biased policy. Yet, they thereby partially neglect their obligations towards Anglo-Canadian citizens.

The government affords individuals belonging to the linguistic minority some compensation by exempting them from having to send their children to French schools. It may provide satisfaction in other ways. It may endeavor to explain the reasons behind its discriminatory measures, as well as guarantee that superior instruction of English in all the schools in order to diminish the social alienation of the Anglophone community.

Surrogate motherhood contracts provide yet another example of conflicting collective duties. A marriage in which the wife is physically incapable of giving birth hires another woman to bear a child for her, either through artificial insemination or the transplantation of a fertilized egg. The defense of these agreements could ride not only on freedom of contract, but also on other moral considerations, such that it would be unfair to deny the spouses the only mechanism available for them to have their own

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101 does in Quebec, where francophone parents must send their children to French-language schools.” TAYLOR, *RECONCILING THE SOLITUDES*, *supra* note 78, at 165-66. *See also id.* at 176.” Quebec has a strong sense of national identity,” assures Taylor, “but [it is] of a kind that the majority of English-speaking North Americans find unfamiliar—connected to a national language, and moreover one that is under threat. Because of this threat, the preservation and health of this language will always be one of the major national goals of French-speaking Canadians.” *Id.* at 100. *See also id.* at 53, 55.

<sup>88</sup> Taylor, *The Politics of Recognition*, *supra* note 78, at 52-53.

child.<sup>90</sup> There are, nevertheless, public norms that condemn these contracts because they exploit the pregnant woman and sacrifice her dignity for the benefit of others.<sup>91</sup>

My starting assumption is that it is right to prohibit these contracts, based on the reasons just mentioned.<sup>92</sup> Those who reject the possibility of collisions between political norms would maintain that once society arrives at this conclusion, there is no room for remorse. The principles at stake must be in tune. Nonetheless, one understands the situation more completely if one admits an antagonism between norms. The community would, accordingly, accept as reasonable an attitude of profound disappointment on the part of the affected couples. It would also experience regret and a need to offer explanations and even excuses. Finally, it would have to provide compensation, perhaps by subsidizing fertility medicines, dedicating more public funds to scientific investigation aimed at solving infertility problems, or permitting exceptions in cases in which the carrier of the fetus is a close relative.

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<sup>89</sup> *Id.* at 53.

<sup>90</sup> See *Johnson v. Calvert*, 5 CAL. 4<sup>TH</sup> 84, 97 (1993) (Surrogate agreements “may be [intending parents’] only means of procreating a child of their own genes.”).

<sup>91</sup> See *In the Matter of Baby M.*, 109 N.J. 396, 439-40 (1988) (“Nevertheless, it is clear to us that it is unlikely that surrogate mothers will be as proportionately numerous among those women in the top twenty percent income bracket as among those in the bottom twenty percent.”); *Id.* at 443 (These arrangements may result in the “degradation of some women.”)

<sup>92</sup> In the United States, virtually all of the existing state statutes ban at least the classical contract in which the surrogate mother receives compensation for her services. See ALA. CODE 26-10A-33 to 26-10A-34 (1992); ARIZ. REV. STAT. ANN. 25-218 (1991 & Supp. 1997); ARK. CODE ANN. 9-10-201 to 9-10-202 (Michie 1998); FLA. STAT. ANN. 742.14-742.17 (West 1997); KY. REV. STAT. ANN. 199.950 (20, 199.590(4), 199.990 (Michie/Bobbs-Merrill 1995); LA. REV. STAT. ANN. 9:2713 (West 1991); MICH. COMP. LAWS ANN. 722.851 to 722.863 (West 1993); NEB. REV. STAT. 25-21, 200 (1996); NEV. REV. STAT. ANN. 126.045 (Supp. 1997); N.H. REV. STAT. ANN. 168-B:1 to 168-B:32 (1994 & Supp. 1995); N.J. REV. STAT. ANN. 9:3-41, 9:17-44 (West 1993 & Supp. 1998); N.Y. DOM. REL. LAW 121-124 (Consol. 1993 & Supp. 1998); N.D. CENT. CODE 14-18-01 to 14-18-07 (1997); OR. REV. STAT. ANN. 109.239, 109.243, 109.247 (1997); UTAH CODE ANN. 76-7-204 (1995); VA. CODE ANN. 20-156 to 20-165 (Michie 1995 Supp. 1998); WASH. REV. CODE ANN. 26.26.210 to 26.26.260 (West 1997); W. VA. CODE 48-4-16 (1998). The German and the French legal systems ban this practice as well. See Embryo Protection Act (Gesetz zum Schutz von Embryonen, EschG), § 1(7), BGBl I, p. 2747 (December 13, 1990) (“There shall be a maximum sentence of two years or a fine for... whoever artificially inseminates or transplants a human embryo to a surrogate mother, i.e., a woman who is willing to surrender her child after birth, on a permanent basis, to a third party.”); Law No. 94-654, Concerning the Donation and Use of Human Body Parts and Products,

Of course, if I went into the last two examples in more detail, I would run into as many complexities and potential descriptions of the conflict at stake as in the Orangemen drama. Opening up to the possibility of political dilemmas, hence, does not lead to a single, comprehensive, and uncontested account of any of these trying situations. It simply enables communities to grasp more fully the dimensions of their predicament.

## V. Counter Reflections

In this section, I will first describe the general concerns that underlie the previous discussion. Immediately thereafter and almost schizophrenically, I will formulate counter arguments.<sup>93</sup> More precisely, I will first identify some aspects of my reasoning that, on second impression, seem problematic and then make the necessary adjustments or clarifications. This kind of self-critique is perhaps the best way to invite others to bring in their own objections.

What initially led me to this subject matter was my uneasiness with the tendency to exclude all conflict between political principles. It is not that I enjoy dissension *per se*, but the inexorable insistence on normative harmony appeared to me to entail some kind of a loss. I sensed that such a position produced distortions in political philosophy analogous to those that Williams identifies in the area of moral philosophy. Accordingly, I felt a compulsion to postulate the possibility of irreducible political dilemmas.

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Medically Assisted Procreation and Prenatal Diagnosis, Art. L. 152-7 (July 29, 1994) ("Human embryos shall not be conceived nor used for commercial or industrial purposes.")

<sup>93</sup> See FERNANDO DE ROJAS, *LA CELESTINA* (Manuel Criado de Val, ed., 1967) ("Upon apologizing for the error in the work that he composed, the author argues against himself and compares.")



However, I realized that it would be an exaggeration to maintain that these conflicts constantly plague political life. It was precisely this concern that moved me to back up a tad in my argumentation. Hence, upon vouching for the possibility of ineluctable political dilemmas, I declared that these conflicts were rare.

My deliberation thus resembled the famous dance that consists in taking three steps forward and two leaps back. I seemed to be assuming the type of philosophical posture that John Austin mocks: “There is the bit where you say it and the bit where you take it back.”<sup>94</sup> The justification for my caution or hesitation was the conviction that overestimating political dilemmas implies distorting and trivializing them. Thus, my qualification did not purport to discount, but rather to underscore the significance of these collisions.

In this declaration of motives, I have already started down the path of counter-argumentation. Now I would like to proceed further in this direction. Once I concede the existence of political conflict, how can I avoid going down the slippery slope and seeing dilemmas everywhere? All kinds of tensions take place in political life. Any time a community regulates individual conduct, it opposes the common good to private interests. For instance, ordinary criminal statutes ineluctably impinge upon people’s freedom.

My argument therefore calls for a distinction between the concepts of tension and dilemma. At a relatively superficial level, I would define a tension as a conflict that is less serious than a dilemma. Unlike the latter, the former does not entail agony or tragedy. It is more common. Almost any political or legal decision involves many

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<sup>94</sup> JOHN L. AUSTIN, *SENSE AND SENSIBILIA* 2 (1964).

tensions. In contrast, dilemmas arise exceptionally, bring about a sense of loss, and create a need for reparations.

The struggle against crime, for example, constantly creates tension between collective and individual interests. This fact only implies that the government must take pains to arrive at a fair balance. Any criminal sanction automatically limits the sphere of personal liberty. Such restriction does not give rise to anything even remotely resembling a social trauma. As long as it does not violate any of its deeply held principles, the polity need not have any qualms. To be sure, the decisions at stake may not only be complex and difficult, but they may also end up amounting to monumental mistakes. Yet, they do not, as such, issue in dilemmas.

I mentioned three instances in which political norms clash. The first example dealt with the Order of Orange of Northern Ireland and the collision between the Catholic minority's entitlements and the Orangemen's freedom of expression. The second case opposed Quebec's democratic efforts on behalf of the national culture against the rights of Anglo-Canadians. The third scenario implicated surrogate motherhood contracts and showed how the principle of equality may run counter to contractual liberty and the right to have a family.

These illustrations bring me to another critical reflection. In my eagerness to highlight potential conflicts between political norms, I seem to be implying that two valid principles may be completely antagonistic or even contradictory and bear no relation to each other. As I have already stated, I do not mean to take this position. I want to stay clear of the idea that the two norms at issue are incommensurate and that one must balance them or choose between them arbitrarily, as if they were mere preferences.

As already noted, Habermas correctly underscores the internal connection between democracy and human rights. Indeed, the exercise of the former presupposes allowing sufficient elbowroom for the latter. Specifically, the democratic will carries normative weight, only to the extent that the majority shows respect for all individuals, that is, for their rights.

Any two political principles must similarly relate to each other or, at the very least, be compatible with each other. Otherwise, they would clash constantly and it would be irrational to try to honor both of them. If a community actually confronts an inconsistency of this nature, it ought to revise its interpretation of the principles and look for a possible reconciliation. If the norms are ultimately reasonable and not arbitrary, they must be consistent. Of course, grasping how they fit together may require a long, perhaps permanent, process of elucidation. At any point, unexpected contradictions may arise. Therefore, the community must be ready to re-examine its assumptions.

To take an extreme case, a polity may at one point embrace both the principle of distributive equality and a libertarian conception of freedom. Such a community will most likely discover soon enough that these two norms run counter to each other. It will then have to go back to the drawing board and rethink its conception of justice. It will finally have to renounce at least one of its two starting principles.

Realizing that two norms contradict each other should not generate dilemmas, regrets, or a need for compensation. Of course, a community may experience frustration when it becomes aware that it has erred in this way. Yet, if it finds a satisfactory solution in the end, its sense of discomfort should abate. Such a scenario thus differs from the cases of irresolvable conflicts that I have been examining.

When two principles collide, they usually do so in their application to a specific situation. In fact, a political norm may collide not only with another norm, but also with itself in a concrete case. For example, freedom of expression would require allowing not only those Chileans favoring, but also those opposing the prosecution of General Augusto Pinochet to demonstrate in front of the Palace of La Moneda. If the two camps sought to march on the same day and at the same time, the Chilean government would not be able to recognize both groups their entitlement without causing pandemonium. Consequently, it would have to give permission to the first group that made the request, decide by lot, or ban all demonstrations on that day. In light of my previous comments, the polity would probably end up lamenting the circumstances and attempting to compensate the injured parties.

If a single principle may thus give rise to conflict, two different norms may certainly meet a similar fate. They may be perfectly compatible as a general matter and, yet, collide in a specific context. External circumstances, such as scheduling or budgetary constraints, may force a community to make a tragic choice.<sup>95</sup>

At this juncture, Habermas might jump in and remonstrate that with this qualification I have actually landed in his camp. He might maintain that he only meant to exclude clashes between political principles themselves, not between their practical implementations. He might point to his distinction between grounding and applying norms and underscore that collisions may crop up in the latter, but not in the former

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<sup>95</sup> Similarly, Marcus maintains that the regret associated with moral dilemma stems not from a conflicting duty, but rather from outside (physical) conditions. “Regret seems appropriate when, owing to circumstance beyond control and despite all reasonably precaution and planning, an agent cannot meet an obligation—when what thwarts it is not a conflicting obligation but a straightforward physical impossibility.” Ruth Barcan Marcus, *More about Moral Dilemmas*, MORAL DILEMMAS AND MORAL THEORY 23, 31 (H.E. Mason, ed., 1996).

process. He might conclude that his position overlaps with my own, as I have just tempered it.

I would respond, first of all, that it is no shame to be in the same boat as Habermas. Secondly, I would turn around and maintain that Habermas actually would not agree with me at all. Even if we were in the same vessel, we would probably row in opposite directions.

Contrary to what I have been arguing all along, Habermas suggests that the application of principles may give rise not to real, but only to apparent conflicts. Accordingly, he carefully wraps the term “collision” in quotation marks in his discussion of norm application.<sup>96</sup> Moreover, he speaks in this regard of a “contest between norms competing, *prima facie*, for application in a given case.”<sup>97</sup> He thereby implies that the deployment process will end up rebutting the purported validity of at least one of the principles for the particular situation at hand. In other words, *a posteriori*, only one of the principles will retain its binding force. This approach contemplates no regret, moral residue, or need for satisfaction in the end. Incidentally, Habermas’s phrase “*prima facie* valid norms”<sup>98</sup> calls to mind W.D. Ross’s concept of a *prima facie* duty, which Bernard Williams regards as the weapon of choice in denying moral dilemmas in concrete cases.<sup>99</sup>

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<sup>96</sup> HABERMAS, *supra* note 3, at 268.

<sup>97</sup> *Id.*

<sup>98</sup> *Id.* at 267.

<sup>99</sup> Analogously to Habermas, Ross views *prima facie* duties as potential obligations that lose all their binding force when a superior duty displaces them. “Since a Rossian *prima facie* duty that remains potential is not an actual duty at all,” Donagan explains, “it cannot be in conflict with the weightier *prima facie* duty that is actualized by defeating it; for it presents nothing to be overridden.” Alan Donagan, *Moral Dilemmas, Genuine and Spurious: A Comparative Anatomy*, MORAL DILEMMAS AND MORAL THEORY 11, 21 (H.E. Mason, ed., 1996)

For my part, I am vouching for weak normative consistency in the sense of Ruth Barcan Marcus.<sup>100</sup> Marcus asserts that moral principles are consistent in the same measure as the rules of “a silly two-person game”<sup>101</sup> that generally allow players to sail smoothly from start to finish, but occasionally bring them to a dead end. She believes that this kind of consistency merely points to the fact that “there are possible circumstances in which no conflict will emerge.”<sup>102</sup> Similarly, I am maintaining that political principles may sporadically clash in application, but mostly do not.

In contrast, Habermas takes it that norms do not ultimately oppose each other, not even when applied to concrete cases. He therefore postulates strong normative consistency. For him, politics resembles a match in which the contestants never reach an impasse.

Of course, Habermas and I would both reject the contention that in applying valid norms, collisions always take place. Such an assertion would suggest that principles are internally inconsistent. It would implicitly equate political life with a contest in which the rules always stalemate the participants.

Hence, Habermas and I converge on the relatively uncontroversial assertion that democracy and human rights (or any other two political norms) do not clash inherently and are broadly compatible. Yet, our agreement on the issue of consistency does not go any further. Habermas would deny the possibility of genuine collisions even in application of norms. I am distancing myself from Habermas on this point and accepting such conflicts as possible.

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<sup>100</sup> Ruth Barcan Marcus, *More about Moral Dilemmas*, MORAL DILEMMAS AND MORAL THEORY 23 (H.E. Mason, ed., 1996).

<sup>101</sup> *Id.* at 26.

<sup>102</sup> *Id.* at 27.

In fact, if Habermas were to join hands with me in recognizing contextual political dilemmas, he would have to abjure, at least in part, his distinction between norms and values. If he were suggesting that valid principles may collide in practice, though not in theory, he would be unable to distinguish values on this front. The values that a polity reasonably embraces may not be intrinsically inconsistent. They may clash solely in a specific situation. For instance, solidarity and individualism do not run counter to each other intrinsically; only in particular contexts, such as when designing family policy.

Another problematic aspect of my discourse is that it extrapolates indiscriminately and unreflectively from individual morals to communal politics. In moving from the former to the latter, one should not take a leap of faith. Though there is a connection between the two realms, the passage from one to the other demands cautiousness and deliberation.

I have already anticipated that attributing responsibility to groups is more difficult than to persons. Yet, it is not necessary to conjecture a mystifying collective *ego*. What is called for is simply a common identity. Community members, jointly, not only acquire rights and duties, but also run the risk of confronting dilemmas. Of course, this phenomenon is complex and its complete elucidation would require struggling with numerous additional philosophical questions.

A final deficiency in my argument is the failure to explain how a community makes a decision in the face of a political dilemma. I assume that there is an objectively correct option, but fail to clarify what such correctness consists in. I already made an attempt generically to exempt myself from empirical questions. I could try to justify

myself now, more specifically, by pointing out that my goal is to understand political dilemmas and not to analyze the issue of objectivity in political philosophy. Yet, such an excuse would be considerably weak since one way of arriving at a sound determination in these cases is precisely through a concept that eliminates the possibility of genuine political dilemmas. These conflicts are philosophically disturbing, to a significant extent, because they appear to preclude an objective resolution.<sup>103</sup>

Just as there is no abstract notion to harmonize the colliding principles, there is no specific method systematically to generate a concrete solution in case of conflict.<sup>104</sup> On the contrary, a multiplicity of concepts and factors contribute, in the most diverse ways, to the settlement of these disputes.<sup>105</sup> Sometimes the urgency of the situation and timing impose a particular solution. An example arises in the area of morality, when a person must miss a crucial appointment due to a moral emergency. In other instances, the principle of the inviolability of basic rights, such as those of Northern Ireland's Catholic minority, carries the day.

Moreover, the answer now and then consists in restricting application range of one of the principles, while granting free reign to the other norm outside this area of protection. The Quebec example illustrates this approach. The actions in defense of national culture and to the detriment of the rights of the minority are legitimate, provided

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<sup>103</sup> See THOMAS NAGEL, *MORTAL QUESTIONS* 128 (1989) ("In [a dilemma] a decision will still be necessary, but it will seem necessarily arbitrary.").

<sup>104</sup> Nagel coincides with me on this point. "This great division between personal and impersonal, or between agent-centered and outcome-centered, or subjective and objective reasons," he contends, "is so basic that it renders implausible any reductive unification of ethics—let alone of practical reasoning in general." *Id.* at 133. See also *id.* at 134, 137, 138.

<sup>105</sup> Nagel seems to favor a similar approach when he makes the following declaration. "What we need most is a method of breaking up or analyzing practical problems to say what evaluative principles apply, and how. This is not a method of decision. Perhaps in special cases it would yield a decision, but more usually it would simply indicate the points at which different kinds of ethical considerations needed to be introduced to supply the basis for a responsible and intelligent decision." *Id.* at 139.



that the democratic majority respects more fundamental rights. Finally, there are moments in which it would be correct to opt for either of the conflicting norms, even by tossing a coin. In the words of Simon Blackburn, the community “has to *plump* for one alternative.”<sup>106</sup> The case of the demonstrations regarding Pinochet’s prosecution may fall within this category.

Of course, these deliberative notions call for additional development. One does not need a complete theory, only a firmer grasp on political reason. Thus equipped, one would be in position thoroughly to account for political dilemmas. My argument does not purport to go that far and, therefore, cannot be but an initial step towards the clarification of this crucial phenomenon in collective civic life.

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<sup>106</sup> Simon Blackburn, *Dilemmas: Dithering, Plumping, and Grief*, MORAL DILEMMAS AND MORAL THEORY 127, 129 (H.E. Mason, ed., 1996).